

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 HERBERT DIAZ,) No. C 06-06912 JW (PR)
11 Petitioner,) ORDER TO SHOW CAUSE
12 vs.)
13 B. CURRY, Warden,)
14 Respondent.)
15 _____)

17 Petitioner, a prisoner at Salinas Valley State Prison, filed a pro se petition for
18 a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the Board of
19 Prison Terms' finding that he was unsuitable for parole. He has paid the filing fee.

20 **BACKGROUND**

21 In 1983, petitioner was convicted by a jury in the Superior Court of the State
22 of California in and for the County of Ventura of first degree murder. He was
23 sentenced to a term of twenty-five years to life in state prison. In 2005, the Board of
24 Prison Terms ("BPT") found him to be unsuitable for parole. He challenged the
25 BPT's decision by way of habeas corpus petitions filed in all three levels of the
26 California courts, which petitions were denied. Thereafter, petitioner filed the

27 Order to Show Cause
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1 instant federal habeas corpus petition on November 6, 2006.

2 **DISCUSSION**

3 A. **Standard of Review**

4 This court may entertain a petition for a writ of habeas corpus “in behalf of a
5 person in custody pursuant to the judgment of a State court only on the ground that
6 he is in custody in violation of the Constitution or laws or treaties of the United
7 States.” 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975). A district
8 court shall “award the writ or issue an order directing the respondent to show cause
9 why the writ should not be granted, unless it appears from the application that the
10 applicant or person detained is not entitled thereto.” 28 U.S.C. § 2243. Federal
11 courts have a duty to construe pro se petitions for a writ of habeas corpus liberally.
12 Zichko v. Idaho, 247 F.3d 1015, 1020 (9th Cir. 2001).

13 B. **Claims**

14 Petitioner claims: (1) the BPT’s decision violation of petitioner’s state liberty
15 interest in parole, an interested protected by his constitutional right to due process;
16 (2) the BPT’s decision was not based on a reasonable determination of the facts
17 insofar as the decision was not supported by sufficient evidence bearing an indicia of
18 reliability; (3) the BPT’s decision violates due process because there was not
19 sufficient evidence to indicate that he is a current and present danger to society; and
20 (4) the BPT’s reliance on the facts of the commitment offense because the offense
21 did not rise to the level of “egregiousness and callousness.” Liberally construed,
22 these claims are cognizable. Accordingly, respondent is directed to SHOW CAUSE
23 why the petition should not be granted.

24 **CONCLUSION**

25 For the foregoing reasons and for good cause shown,

26 1. The clerk of the court shall serve by certified mail a copy of this order

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1 and the petition and all attachments thereto upon respondent and respondent's
2 attorney, the Attorney General of the State of California. The clerk shall also serve a
3 copy of this order on the petitioner at his most current address.

4 2. Respondent shall file with this court and serve upon petitioner, no later
5 than **ninety (60) days** of the issuance of this order, an answer conforming in all
6 respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a
7 writ of habeas corpus should not be issued.

8 If petitioner wishes to respond to the answer, he shall do so by filing a
9 traverse with the court and serving it on respondent no later than **forty-five (45)**
10 **days** of his receipt of the answer. Should petitioner fail to do so, the petition will be
11 deemed submitted and ready for decision **forty-five (45) days** after the date
12 petitioner is served with respondent's answer.

13 3. Respondent may file, within **ninety (90) days** a motion to dismiss on
14 procedural grounds in lieu of an answer, as set forth in the Advisory Committee
15 Notes to Rule 4 of the Rules Governing Section 2254 Cases. If respondent files
16 such a motion, petitioner shall file with the court and serve on respondent an
17 opposition or statement of non-opposition to the motion no later than **forty-five (45)**
18 **days** of receipt of the motion, and respondent shall file with the court and serve on
19 petitioner a reply no later than **fifteen (15) days** of receipt of any opposition.

20 4. It is petitioner's responsibility to prosecute this case. Petitioner must
21 keep the court informed of any change of address by filing a separate paper with the
22 clerk of the court headed "NOTICE OF CHANGE OF ADDRESS," and comply
23 with any orders of the court within the time allowed or ask for an extension of that
24 time. Failure to do so may result in the dismissal of this action for failure to
25 prosecute pursuant to Federal Rule of Civil Procedure 41(b). See Martinez v.
26 Johnson, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

1 5. Petitioner is reminded that all communications with the court, whether
2 by way of formal legal motions or informal letters, must be served on respondent by
3 mailing a true copy of the document to respondent's counsel.

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5 DATED: July 31, 2007

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28 JAMES S. WARE
For the Northern District of California
United States District Judge